Hup Cheong Motor Co v Saong Jonathan & Anor (Tan Bros Trading Co, Claimant)

HIGH COURT (KUCHING) — APPLICATION FOR EXECUTION NO KG 22 OF 1990
HAIDAR J
27 DECEMBER 1991

Civil Procedure *— Interpleader summons — Property seized in execution — Property assigned absolutely to claimant — Whether deed of assignment valid — Proving claim to property*

Revenue Law *— Stamp duties — Deed of assignment — Absolute assignment of property — Whether deed liable to be stamped — Cancellation of stamp — Failure to comply with mandatory procedure for cancellation — Instrument deemed unstamped — Effect thereof — Stamp Act 1949 ss 2, 7 & 52(1)*

The plaintiff had seized a reconditioned dump truck ('the property') pursuant to a writ of seizure and sale. The property was in the possession of the claimant at the material time and was seized despite protests raised by the claimant's agent. An interpleader summons was issued by the court for the claimant to establish their claim to the property. It was agreed that the first defendant had by deed assigned absolutely all his rights and benefits under a licence to import 15 units of dump truck (including the property seized) to the claimant and accordingly the property was not available for seizure by the plaintiff. The issues to be decided were whether the deed of assignment executed for valuable consideration was valid or a sham and whether the deed was duly stamped under the Stamp Act 1949 ('the Act').

Held, allowing the claimant's claim:

(1) From the facts deposed in the affidavits and the various exhibits annexed thereto, the court had no reason to doubt that the deed of assignment was an absolute assignment. The claimant had acted in accordance with the deed and therefore the ownership of the property was with the claimant at the time of the seizure and would appear not to be available to the plaintiff as judgment creditor for seizure thereof.

(2) As the assignment was for valuable consideration, it was a good assignment giving the claimant absolute ownership of the 15 units of dump truck (including the property seized by the plaintiff). All costs of importing and payment of customs duties were paid by the claimant. In the circumstances, the court was of the opinion that the assignment was an absolute assignment and not a sham.

(3) Although the deed of assignment appear to be duly stamped, the claimant had not complied with the procedure prescribed in s 7(3) of the Act for cancellation of the stamp. Compliance with the said procedure was mandatory as the failure to comply therewith would by s 7(5) mean that such instrument would be deemed to be unstamped, and according to s 52(1) of the Act would be inadmissible.

(4) In the present case, however, as the deed was not a document which fell under the categories mentioned in s 47, it could be admitted in evidence in accordance with s 52(1) proviso (a) of the Act on payment of a penalty of $25.

[Bahasa Malaysia summary

Plaintif telah menyita sebuah lori pembuang yang telah diperbaiki ('harta itu') mengikut writ penyitaan dan penjualan. Harta itu berada dalam milikan penuntut pada masa penting itu dan telah disita walaupun bantahan telah ditimbulkan oleh ejen penuntut. Suatu saman interplider telah dikeluarkan oleh mahkamah untuk penuntut membuktikan tuntutan mereka atas harta itu. Telah dipersetujui bahawa defendan pertama telah melalui suratikatan menyerahhak secara mutlak semua hak-hak dan faedah-faedah beliau di bawah suatu lesen mengimport 15 unit lori pembuang (termasuk harta yang disita itu) kepada penuntut dan oleh itu harta itu tidak bebas untuk disita oleh plaintiff. Isu-isu untuk diputuskan adalah sama ada suratikatan penyerahan hak itu yang telah disempurnakan dengan balasan yang berharga ialah sah atau palsu dan sama ada suratikatan itu telah ditera seperti yang sepatutnya di bawah Akta Setem 1949 ('Akta itu').

Diputuskan, membenarkan tuntutan penuntut itu:

(1) Daripada fakta yang telah diterangkan dalam afidavit itu dan berbagai-bagai ekshibit yang dilampirkan padanya, mahkamah tidak mempunyai sebab untuk meragui bahawa suratikatan penyerahan hak itu adalah penyerahan hak mutlak. Penuntut telah bertindak mengikut suratikatan itu dan oleh kerana itu keempunyaan harta itu adalah pada penuntut pada masa penyitaan itu dan nampaknya tidak bebas bagi plaintif sebagai pemiutang penghakiman untuk menyita harta itu.

(2) Kerana penyerahan hak itu adalah untuk balasan berharga, ia adalah suatu penyerahan hak yang sah memberikan penuntut keempunyaan mutlak atas 15 unit lori pembuang (termasuk harta yang disita oleh plaintif). Semua kos pengimportan dan pembayaran duti kastam telah dibayar oleh penuntut. Dalam keadaan begitu, mahkamah berpendapat bahawa penyerahan hak itu adalah suatu penyerahan hak mutlak dan bukan palsu.

(3) Walaupun suratikatan penyerahan hak itu nampaknya ditera seperti yang sepatutnya, penuntut tidak mematuhi prosedur yang telah ditetapkan dalam s 7(3) Akta itu bagi pembatalan setem itu. Pematuhan prosedur tersebut adalah mandatori kerana kegagalan mematuhinya mengikut s 7(5) bermaksud bahawa suratcara seperti itu dianggap tidak ditera, dan tidak boleh diterima mengikut s 5(1) Akta itu.

(4) Di dalam kes ini walau bagaimanapun, kerana suratikatan itu bukan suatu dokumen yang jatuh di bawah kategori-kategori yang disebut dalam s 47, ia boleh diterima sebagai keterangan mengikut s 52(1) proviso (a) Akta itu dengan pembayaran penalti sebanyak $25.]

Cases referred to

1 *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 (refd)

2 *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 (refd)

3 *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198 (refd)

Legislation referred to

Stamp Act 1949 ss 2, 7, 52(1)

HC Lee (*HC Lee Advocates*) for the plaintiff.
SY Chan (*Ee & Lim Advocates*) for the claimant.

Cur Adv Vult

Haidar J: An interpleader summons dated 2 July 1991 (encl 37) was issued by the court for the claimant, Tan Brothers Trading Co, to establish their claim to a property taken in execution pursuant to O 17 r 2 and O 74 r 11 of the Rules of the High Court 1980. The notice was duly served on the plaintiff's solicitors. The plaintiff disputed the claimant's claim. The property taken in execution is in respect of a reconditioned Toyota Dyna Dump Truck, Chassis No BU 20–099302, Engine No 0516419 ('the property').

On 21 March 1991 the bailiff of the court, together with the plaintiff's agents/servants, pursuant to a writ of seizure and sale taken out by the plaintiff seized the property at the gate of the Kuching Port Authority after the customs duties were paid by the claimant. At the material time the property was in the possession of the claimant. Though the seizure was protested against by the claimant's agent and their Mr Liew, the seizure of the property was eventually allowed, apparently because of the order of seizure by the court.

From the facts disclosed in this interpleader summons, there are two issues before the court. The two issues are:

(1) whether the alleged deed of assignment ('LTK 7') purportedly assigning the first defendant's rights and benefits in respect of import permit Nos A 90/1078, A 90/1079 and A 90/1080 for a cash consideration of $45,000 to the claimant is valid;

(2) whether LTK 7 was duly stamped under the Stamp Act 1949 ('the Act').

The first issue

According to LTK 7, in consideration of the sum of $45,000, which the first defendant acknowledged receipt, the first defendant *absolutely* assigned all his rights and benefits under the licence to import 15 units of dump truck to the claimant. It was specifically agreed that the claimant shall be fully responsible for all costs of importing the 15 units and for payment of customs duties and that the ownership of the 15 units to be imported shall be the claimant's absolutely. Since the assignment, the claimant had already imported eight units of dump truck, six of which were imported

before the date of the seizure of the property (see paras 8 of the affidavit of Mr Liew Teck Kheng and exhs 'LTK 13A' to 'LTK 18C'). As the approved permits were issued in the name of the trading firm of the first defendant, namely, Malaysia Natural Resources, the imports of the eight units were made by the claimant in the name of Malaysia Natural Resources as shown by the invoices and the import declaration forms (see exhs A and C). The purchase price for the units was paid by the claimant as agreed in LTK 7 (see exh B). Payments of the import duties, as agreed, were paid by the claimant (see para 10 of the affidavit of Mr Liew Teck Kheng). Exhibits LTK 19A, B and C read with exh 18C clearly show that import duty for the property was paid by the claimant before the seizure took place. All these were done in accordance with LTK 7 and therefore the ownership of the property was with the claimant at the time of the seizure and would therefore appear not to be available to the plaintiff as judgment creditor for seizure thereof.

From the facts deposed in the affidavits and the various exhibits annexed thereto, I do not have reason to doubt that LTK 7 was an absolute assignment. The plaintiff merely contended that LTK 7 is a sham. In considering whether LTK 7 is an absolute assignment and not purporting to be by way of a charge under s 4(3) of the Civil Law Act 1956, the case of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd*[1] is relevant for consideration where Seah FJ said at p 271:

> The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights, title and interest in the sale agreement dated 1 April 1977 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be absolute assignment because of the use of the word 'absolutely' in cl 1 thereof (see Fry LJ in *Comfort v Betts* [1891] 1 QB 737 at p 740).

Again in the case of *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd*[2] it was held that because of the word 'absolutely' used in the assignment, the assignment is an absolute one.

As the assignment is for valuable consideration, it is therefore a good assignment giving the claimant absolute ownership of the 15 units of dump truck (including the property seized by the plaintiff) imported or to be imported under the approved permits on condition that all costs of importing and payment of the customs duties were paid by the claimant/assignee which is the case here. In this respect, para 1371 of 16 *Halsbury's Laws of England* (4th Ed) says:

> An assignment for valuable consideration of property to be afterwards acquired by the assignor, while it operates as a covenant to assign the property when acquired, and the beneficial interest passes as soon as the property is acquired by the assignor, does not take effect solely in contract, but confers an immediate interest on the assignee which is not affected by the assignor becoming bankrupt and obtaining his discharge before the property is acquired.

In the circumstances I am of the opinion that LTK 7 is an absolute assignment and not a sham as contended by the plaintiff.

The second issue

A deed of assignment is an instrument chargeable with stamp duty as it falls under the first schedule of the Act (see item 12 read with item 32 of the said schedule). The stamp duty chargeable would appear to be $10. The stamp of this amount was duly affixed on LTK 7. It would thus appear that LTK 7 was duly stamped. Under s 2 of the Act 'duly stamped' is defined:

> As applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in Malaysia.

In the case of Sabah and Sarawak the proviso even allows for 'an official receipt for the proper amount may be affixed to any instrument in lieu of the stamp, and the instrument shall then be deemed to be duly stamped'.

It would appear that the claimant has duly complied with the provisions of s 7(1) and (2) of the Act in respect of the mode of paying and denoting duty chargeable.

However, I have next to consider whether s 7(3) has been complied with. Section 7(3) reads:

> Stamps used for any of the instruments described under any of the articles in the First Schedule and not included in the Second Schedule shall, and stamps used for any of the instruments described under any of the articles in the Second Schedule may, be cancelled as follows: The instrument, or the paper on which it is proposed to be written, shall be taken to the office of the Collector and the stamp shall there be cancelled by having the words "Stamp Office" with the name of the district and the date written or printed partly on the stamp and partly on the paper to which the stamp is affixed.

Section 7(3) thus prescribes the procedure for cancellation of a stamp on any instrument. From the facts disclosed it would appear that the claimant has not complied with the procedure prescribed in s 7(3) and the compliance with the said procedure, it would seem to me, is mandatory as the failure to comply therewith would by s 7(5) mean that such instrument would be deemed to be unstamped. Section 7(5) reads:

> Any instrument bearing a stamp which has not been so cancelled in the manner prescribed in this section that it cannot be used again shall, so far as such stamp is concerned, be deemed to be unstamped.

In that event instruments that are not duly stamped, according to s 52(1) of the Act would be inadmissible. Section 52(1), so far as is relevant, reads:

> No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped:
>
> Provided that —
>
> (a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof under section 43 or section 47A;

The effect of s 52(1) of the Stamp Ordinance 1949 (now the Stamp Act 1949) was considered by the then Federal Court in *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors.*[3] It would appear that under s 52(1), except for certain types of instruments, prohibition against admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but conditional on payment of a duty or a penalty, if any, under ss 43 and 47A. In the present case the instrument is not a document which falls under the categories mentioned in s 47 and that being the case, LTK 7 could be admitted in evidence in accordance with proviso (a) to s 52(1) on payment of a penalty of $25 or four times the amount of the deficient duty, whichever sum be the greater under s 47A of the Act. According to the case of *Malayan Banking Bhd,*[3] the Federal Court at p 201 said:

> If it appears to be unstamped the authority concerned has no choice but to impound the document and admit the same on payment of the necessary duty or penalty under proviso (a) to s 52(1) and thereafter send the impounded documents to the Collector of Stamp Duty together with the duty or penalty for stamping under s 53.

The proper order I should make in this case is (a) the deed of assignment (LTK 7) is impounded; (b) the claimant through their solicitor must pay the penalty of $25 to the Registrar of the High Court who will send the sum together with LTK 7 to the Collector of Stamp Duty for stamping; (c) the property to be released by the sheriff to the claimant; (d) costs to the claimant; and (e) the stamping of LTK 7 in accordance with s 53 must first be done before the order is drawn.

Order accordingly.

Reported by Mathavan Devadas